No. 14-1406

In the Supreme Court of the United States

STATE OF NEBRASKA ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress diminished the boundaries of the Omaha Indian Reservation by the Act of Aug. 7, 1882, ch. 434, 22 Stat. 341.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Hagen v. *Utah*, 510 U.S. 399 (1994) 7
Solem v. *Bartlett*, 465 U.S. 463 (1984) ..... *passim*
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 12
Sprietsma v. *Mercury Marine*, 537 U.S. 51 (2002) 9

Treaties and statutes:

Treaty of Mar. 16, 1854, U.S.-Omaha Tribe, 10 Stat. 1043 2
art. 4, 10 Stat. 1044 2
Treaty of Mar. 6, 1865, U.S.-Omaha Tribe, 14 Stat. 667 2
art. I, 14 Stat. 667 2
art. V, 14 Stat. 668 2
Act of June 10, 1872, ch. 436, 17 Stat. 391 2
Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 2
§ 8, 22 Stat. 343 3
18 U.S.C. 1161 4

Miscellaneous:

71 Fed. Reg. 10,056 (Feb. 28, 2006) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 774 F.3d 1166. The opinion of the district court (Pet. App. 9-78) is reported at 996 F. Supp. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2014. A petition for rehearing en banc was denied on February 26, 2015 (Pet. App. 80-81). The petition for a writ of certiorari was filed on May 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1854, the Omaha Tribe entered into a treaty with the United States "reserv[ing]" land for the

Omahas "for their future home." Treaty of Mar. 16, 1854, U.S.-Omaha Tribe, 10 Stat. 1043. The Tribe agreed to "cede" to the United States "all claims" to a portion of its historic lands in exchange for a fixed sum of $840,000. *Id.* art. 4, 10 Stat. 1044. The remaining land, which was designated the Omaha Reservation, comprised 300,000 acres in northeast Nebraska. Pet. App. 20.

In 1865, the Tribe agreed to "cede, sell, and convey" to the United States approximately 98,000 acres from the northern part of the Reservation in exchange for a fixed sum of $50,000 and certain other promises by the government. Treaty of Mar. 6, 1865, U.S.-Omaha Tribe, 14 Stat. 667. The 1865 Treaty required the Tribe to "vacate and give possession of the lands ceded" by the treaty "immediately after its ratification," so that land could be made available to the Winnebago Tribe.[1] *Id.* arts. I & V, 14 stat. 667-668.

In 1872, in response to a request from the Tribe, Congress authorized the Secretary to survey, appraise, and sell up to 50,000 acres on the western side of the Reservation, to be delineated by a north-south line. Act of June 10, 1872, ch. 436, 17 Stat. 391. The 1872 Act provided that the proceeds would be deposited in the United States Treasury for the benefit of the Tribe. *Ibid.* The 1872 Act failed to raise substantial funds, however: Only two sales comprising 300.72 acres were made under the statute. Pet. App. 23.

b. In 1882, Congress again authorized the Secretary to survey, appraise, and sell lands on the western side of the Reservation. Act of Aug. 7, 1882, ch. 434,

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[1] In 1874, the Omaha Tribe sold to the United States an additional 12,374.53 acres from the northeastern corner of the Reservation for use by the Winnebago Tribe. Pet. App. 24.

22 Stat. 341. The 1882 Act provided that "the Secretary of the Interior [shall] be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company." *Ibid.* The Tribe had granted the "right of way" mentioned in the 1882 Act two years earlier. The right-of-way ran in a diagonal line "from the northern edge of [the] reservation generally southeastward" to its southern border. Pet. App. 20.

The 1882 Act allowed the Omahas to select allotments in the opened area. The Act provided that Tribe members "may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act." § 8, 22 Stat. 343. "[U]nallotted lands" west of the railroad right-of-way were made available for purchase and settlement by non-members, with the sale proceeds "placed to the credit of said Indians in the Treasury of the United States." *Id.* at 341

Following the 1882 Act, Tribe members selected 10 to 15 allotments, totaling 876 acres, west of the railroad right-of-way. Pet. App. 34. The rest of the newly opened land was sold to settlers and patented over the next several decades. *Id.* at 34, 36.

2. a. Pender, Nebraska, is a town of approximately 1300 residents situated on land lying west of the Sioux City and Nebraska railroad right-of-way, in the area opened to sale by the 1882 Act. Pet. App. 14-15, 38. In 2004, the Omaha Tribe adopted an alcoholic beverage control ordinance regulating the sale of alcohol within the boundaries of the Omaha Reservation. *Id.*

at 16. The ordinance was certified by the Department of the Interior in 2006. 71 Fed. Reg. 10,056 (Feb. 28, 2006). Following certification, the Tribe began notifying liquor retailers, including retailers in Pender, of its intention to enforce the ordinance. Pet. App. 16-18.

In 2007, Pender and several beverage retailers sued tribal officials in federal district court seeking a declaration that Pender is not within the Omaha Reservation and seeking an injunction barring the Tribe from enforcing its liquor ordinance against them. Pet. App. 18. The court granted a temporary restraining order and stayed further proceedings so that the plaintiffs could exhaust their remedies in Omaha tribal court. *Id.* at 18-19. On February 4, 2013, the tribal court concluded that the 1882 Act did not diminish the Omaha Reservation's boundaries. *Id.* at 19. This action resumed in the district court, where the State of Nebraska intervened as a plaintiff and the United States intervened as a defendant. *Id.* at 46-47.

b. On cross motions for summary judgment, the district court ruled against petitioners. Pet. App. 9-78. The court observed at the outset that petitioners had conceded that 18 U.S.C. 1161 permits the Tribe to regulate liquor sales "on its reservation land and in 'Indian country,'" Pet. App. 11 n.2, and thus that the Tribe's ordinance applies to liquor retailers in Pender if the retailers are within the Omaha Reservation. The court then proceeded to apply the three-prong test articulated in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), for determining whether a statute "clearly evince[s]" the requisite Congressional intent to "divest a reservation of its land and diminish its boundaries." *Id.* at 470. Evaluating each factor, the court concluded that Congress did not intend for the 1882

Act to diminish the Omaha Reservation. Pet. App. 55-76.

First, the district court looked at the statutory language, which *Solem* identified as the "most probative evidence of congressional intent." 465 U.S. at 470. The court agreed with petitioners' "admi[ssion]" that the language of the 1882 Act "does not work in their favor." Pet. App. 56. The court based that conclusion on several features of the Act:

> The language of the 1882 Act does not provide for cession, relinquishment, conveyance, or surrender of all rights, title, or interest to the Omaha Tribe's land in exchange for a specific sum of money; does not restore lands to the public domain; and does not require the Tribe to vacate their reservation land. Rather, the Act states that land west of the right-of-way could "be surveyed, if necessary, and sold" and, after survey and "appraisement," could be proclaimed by the Secretary of the Interior as "open for settlement." Proceeds of the sales were to be "placed to the credit of said Indians in the Treasury of the United States," and income was to "be annually expended for the benefit of said Indians." Further, Article 8 of the 1882 Act allows "Indians . . . [to] select the land which shall be allotted to them in severalty *in any part of said reservation either east or west of said right of way*," suggesting that Congress intended the land west of the right-of-way to remain part of the Omaha Reservation.

Id. at 57 (brackets in original) (citation omitted). The court also noted the contrast between the 1882 Act and "the Omaha Treaties of 1854 and 1865," in which the Tribe "expressly agreed to 'cede, sell, and convey'

land to the United States and 'relinquish . . . all claims' thereto in exchange for fixed sums of money, demonstrating that both Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so." *Id.* at 58 (citations omitted).

Second, the district court examined "[t]he legislative history and the circumstances surrounding the 1882 Act." Pet. App. 63. In the court's view, "[n]one of th[e] legislative history establishes that Congress clearly contemplated" diminishment of the Reservation. *Id.* at 65; see *ibid.* ("[T]he parties do not cite, nor does the court find, specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries."). The court concluded that the evidence was "insufficient to establish an 'unequivocal,' widely held, contemporaneous understanding that the 1882 Act would diminish or alter the boundaries of the Omaha Reservation." *Ibid.* (quoting *Solem*, 465 U.S. at 471).

Following its analysis of the second *Solem* factor, the district court stated:

> Because I have found that both the language in the 1882 Act and its legislative history "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," I am "bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. However, I shall address the third prong of the well-established diminishment "analytical structure," as courts are to consider all three factors in determining whether an Indian reservation has been diminished.

Pet. App. 68-69 (citation omitted).

The district court thus turned to the third *Solem* factor—the subsequent treatment of the area and the pattern of settlement—which is considered "'less illuminating' than contemporaneous evidence." Pet. App. 69 (quoting *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994)). The court analyzed five statutes enacted between 1885 and 1894, which (1) referred to the opened area as "the 'Omaha Indian Reservation' and 'Omaha lands,'" (2) confirmed that the United States continued to serve as trustee over the opened area with respect to sale proceeds for the Tribe's benefit, and (3) required the Tribe's consent before granting payment extensions to buyers of parcels within the opened area. *Id.* at 70-72 (citations omitted). Those statutes, the court found, "suggest[] the continued reservation status of the disputed lands." *Id.* at 72. As to "treatment of the area west of the right-of-way following the 1882 Act," the court concluded that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." *Ibid.*[2] Finally, the

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[2] Among other things, the district court found the following: Since 1922, the Nebraska legislature has defined the western boundary of Thurston County, which lies within the area opened to sale by the 1882 Act, as lying within the existing Omaha Reservation. Pet. App. 40-41. In 1969, the Nebraska legislature retroceded to the United States criminal jurisdiction over certain offenses committed within Indian country that is located in Thurston County. *Id.* at 42. "The legal description of the land in the Notice of Acceptance of Retrocession of Jurisdiction delineates the Omaha Indian Reservation *as originally surveyed*." *Ibid.* (emphasis added). In 1992, the Nebraska State Tax Commissioner issued a Revenue Ruling locating the Village of Pender "within the boundaries of the Omaha Indian Reservation." *Id.* at 48.

district court found "'mixed' evidence regarding the demographics of the area west of the right-of-way." *Id.* at 76 (citation omitted).

Summarizing its findings, the district court stated:

> [N]either the 1882 Act's statutory language, the legislative history and circumstances surrounding the passage of the Act, nor the demographic history of the land west of the right-of-way demonstrate clear congressional intent to diminish the boundaries of the Omaha Indian Reservation or a widely-held, contemporaneous understanding that Congress's action would diminish those boundaries.

Id. at 77.

3. The court of appeals affirmed. Pet. App. 1-8. Based on its "de novo review" (*id.* at 6), the court of appeals concluded that the district court had

> accurately discerned the contemporaneous intent and understanding of the 1882 Act. The [district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus.

Id. at 7. The court of appeals thus found "nothing in this case to overcome the 'presumption in favor of the continued existence' of the Omaha Indian Reservation." *Ibid.* (internal quotation marks omitted). While recognizing the impact of its decision on the community of Pender, the court of appeals concluded that "the district court conducted the appropriate analysis and we agree." *Id.* at 8.

Petitioners sought rehearing and rehearing en banc, but their requests were denied. Pet. App. 80-81.

ARGUMENT

Petitioners seek this Court's review regarding "[w]hether ambiguous evidence concerning the first two *Solem* factors necessarily forecloses any possibility that diminishment could be found on a *de facto* basis." Pet. i. See *Solem* v. *Bartlett*, 465 U.S. 463 (1984). That question is not presented here, because the district court found—and the court of appeals agreed—that none of the three *Solem* factors favored petitioners' diminishment claim. That conclusion, which turns on statutes and circumstances unique to this one Reservation, does not conflict with the decision of any other court of appeals.

1. As a threshold matter, the petition should be denied because petitioners have waived the issue on which they seek review. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (arguments not raised below are waived). Petitioners did not argue in the court of appeals, as they do in this Court, that the district court's analysis had "preclude[d] proper consideration" of the third *Solem* factor. Pet. 10. To be sure, petitioners *did* argue that the third factor should be resolved in their favor—*i.e.*, they argued that historical and demographic evidence pointed towards diminishment, rather than being "inconsistent" and "mixed," as the district court had found. Pet. App. 72, 76; see State of Neb. C.A. Br. 10-13; Brehmer et al. C.A. Br. 49-59. But petitioners did not contend that the district court had exclusively relied on the first two *Solem* factors in a manner that "necessarily foreclose[d] any possibility" of finding diminishment based

on the third factor. Pet. i. The petition should be denied on that basis alone.

2. The question presented is also not implicated by this case, because it rests on premises that are factually incorrect: The courts below did not conclude that their assessment of the first two *Solem* factors "foreclose[d]" consideration of the third factor. Pet. i. Rather, the district court examined all three factors at great length, concluding that none of them "demonstrate[d] clear congressional intent to diminish the boundaries of the Omaha Indian Reservation," as required for a finding of diminishment under *Solem*. Pet. App. 77. With respect to the third factor in particular, the district court found: (1) that statutes enacted after 1882 "suggest[] the continued reservation status of the disputed lands," *id.* at 72; (2) that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States," *ibid.*; and (3) that "evidence regarding the demographics of the area west of the right-of-way" was "mixed," *id.* at 76. The court of appeals endorsed the district court's analysis, including the district court's treatment of "contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends." *Id.* at 7. Those express findings refute petitioners' assertion that either court relied on the first two factors to "create[] a *conclusive presumption of non-diminishment* not subject to rebuttal by evidence concerning the third *Solem* factor." Pet. 16-17.

Petitioners point to the district court's statement that it was "bound * * * to rule that diminishment did not take place" in light of "the language in the 1882

Act and its legislative history." Pet. 18 (quoting Pet. App. 68). Petitioners also highlight the district court's statement that "even if th[e] demographic evidence did establish diminishment, it cannot overcome my conclusion that the language of the 1882 Act itself does not clearly evince Congress' intent to diminish the Omaha Reservation." Pet. 19 (quoting Pet. App. 76) (emphasis omitted). Yet those statements are fully consistent with petitioners' own statement below that "diminishment cannot be based solely on demographic data and subsequent treatment." Pet. for Reh'g 6.

In any event, the district court *did* proceed to "address the third prong of the well-established diminishment" test, acknowledging that "courts are to consider all three factors in determining whether an Indian reservation has been diminished." Pet. App. 68-69. And the court found that the demographic evidence was "mixed," favoring neither side. *Id.* at 76. Petitioners accordingly could not have prevailed on their diminishment claim, regardless of the amount of weight given to the third *Solem* factor. Moreover, the court of appeals, in finding the Reservation was not diminished by the 1882 Act, relied on the district court's "careful[] review" of not only the legislative history and contemporary context of the 1882 Act itself, but also of "subsequent congressional and administrative references to the Reservation, and demographic trends," Pet. App. 7—matters specifically relevant to the third *Solem* factor. Thus, the decision of the court of appeals, which petitioners ask the Court to review, clearly did consider the third *Solem* factor.

3. Finally, the decision below does not conflict with the decision of any other court of appeals or otherwise warrant review. This Court has explained that courts should begin with a "presumption that Congress did not intend to diminish the reservation." *Solem*, 465 U.S. at 481. That presumption may be overcome only by "substantial and compelling evidence of a congressional intention to diminish Indian lands." *Id.* at 472. In this case, as described above, the district court found—and the court of appeals agreed—that none of the three *Solem* factors favored a finding of diminishment. See Pet. App. 7; *id.* at 77.

Petitioners repeatedly refer to "ambiguous evidence concerning the first two *Solem* factors." Pet. i; see Pet. 18 ("ambiguity regarding the first two *Solem* factors); Pet. 19 ("ambiguous evidence regarding statutory language and legislative history"); Pet. 25 ("ambiguous evidence"). In fact, the courts below found that the first factor, which this Court has labeled the "most probative evidence of congressional intent," *Solem*, 465 U.S. at 470, strongly suggests that Congress did not intend to diminish the Reservation. See Pet. App. 55-62; see also *id.* at 56 ("[Petitioners] admit that the most probative factor to be examined in a diminishment inquiry * * * does not work in their favor."). In any event, petitioners misunderstand their burden under this Court's diminishment jurisprudence—including the admonition that courts must "resolve any ambiguities in favor of the Indians." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (citation omitted). A finding of diminishment requires evidence "establish[ing] a clear congressional purpose to diminish the reservation." *Solem*, 465 U.S. at 476. Petitioners' assertion that the

evidence concerning the first two *Solem* factors was "ambiguous"—and the similar conclusion by the courts below concerning the third factor—do not demonstrate the requisite "clear congressional purpose."

Indeed, petitioners do not claim that this case would have come out differently in another circuit. Instead, petitioners selectively identify evidence relating to the third *Solem* factor, "demographic and jurisdictional history," which purportedly supports their position. Pet. 19-25. But the district court examined all evidence in the record and concluded that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." Pet. App. 72; see *ibid.* (finding "[a] 'mixed record' which fails to reveal a consistent or dominant approach to the territory at issue"). The court also found "'mixed' evidence regarding the demographics of the area west of the right-of-way." *Id.* at 76. Petitioners may disagree with those fact-bound conclusions, but any such disagreement does not create a dispute worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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